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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

SHUFFLE MASTER, INC. and IGT,

Plaintiffs,

v.

MP GAMES LLC D/B/A MINDPLAY
GAMES, ROBERT MOUCHOU,
ALLIANCE GAMING CORP. D/B/A
BALLY GAMING AND SYSTEMS and
BALLY GAMING, INC.,

Defendants.

CV-N-04-0407-ECR (RAM)

**PLAINTIFFS' OPPOSITION TO
DEFENDANTS' MOTION TO STRIKE THE
SUPPLEMENTAL EXPERT REPORT OF
JAMES T. CARMICHAEL AND THE
PORTIONS OF THE SUPPLEMENTAL
EXPERT REPORT OF JOHN STRISOWER
ADDRESSING PLAINTIFFS'
INTERFERENCE CLAIM FOR VIOLATION
OF THE COURT'S JUNE 14, 2007 ORDER**

I. INTRODUCTION

The Court's June 14 Order permitted the parties "to submit supplemental expert reports on the issue of obviousness." Ex. A (June 14, 2007 Order). This is exactly what Plaintiffs did. Defendants do not dispute that obviousness is the backbone of an interference determination. Indeed, the interference analysis is simply a determination of whether any claim of the Schubert patent anticipates or renders obvious any claim of the MindPlay patents. *Medichem, S.A. v. Rolabo, S.L.*, 437 F.3d 1157, 1161 (Fed. Cir. 2006) ("two patents interfere only if (1) invention A either anticipates *or renders obvious* invention B, where Party A's claimed invention is presumed to be prior art vis-à-vis Party B and (2) vice versa.")(emphasis added). The interference section of the Strisower and Carmichael reports that Defendants attack simply explain how certain claims of the Schubert patent render obvious certain claims of the MindPlay patents, especially in light of the factors identified as appropriate for consideration by the Court in *KSR*. There are no new interference conclusions reached, just an explanation as to how the factors that the *KSR* Court set forth as appropriate for consideration in an obviousness analysis support what Mr. Carmichael and Mr. Strisower have said all along on the obviousness-based interference issues.¹

In a transparent attempt to have this obviousness-based interference determination made based upon the "too rigid" Federal Circuit standard and in a desperate attempt to save their patents, Defendants play word games. Again, without ever disputing that obviousness is the backbone of an interference determination, Defendants claim that Plaintiffs should not be permitted to explain how certain claims of the Schubert patent render obvious certain claims of the MindPlay patents under the standards articulated by the Supreme Court, because the ultimate conclusion of that obviousness analysis is that the MindPlay patent claims are invalid as interfering with the Schubert claims, and

¹ Defendants continually attempt to mislead the Court by stating that Mr. Strisower's previous report on interference was "only two sentences long." Motion to Strike at 5. In truth, Mr. Strisower reviewed over 75 pages of detailed analysis and he "incorporate[d] Mr. Carmichael's opinions on those topics [therein]." Strisower 6/30 Report at (Continued...)

allegedly, the parties (in their discussions regarding a stipulation that was not even entered by the Court) never specifically referred to interference. However, neither the Court Order nor the unentered stipulation needed to specifically refer to interference to permit the Plaintiffs to supplement the expert reports in the manner that they were supplemented. The unentered stipulation and the Court Order specifically permit the parties to submit supplemental expert reports on the issue of obviousness. Again, the interference portions of Plaintiffs' supplemental expert reports simply explain how certain claims of the Schubert patent render obvious certain claims of the MindPlay patents under the standards expressed in *KSR*. As such, this analysis falls squarely within the context of the Court Order. And even if the Court Order did not expressly permit such supplemental analysis (although it does), it makes absolutely no sense for Plaintiffs to be precluded from supplementing their expert reports on this issue. The Court and the parties recognized that *KSR* justified supplementing expert reports on issues that were impacted by *KSR*. Defendants motion to strike boils down to a failed attempt of "gotcha." However, this case should be decided on the merits and under the appropriate legal standards. Even if Defendants were somehow misled into believing that there would be no supplement to that portion of the expert reports that demonstrated how certain claims of the Schubert patent anticipated or rendered obvious certain claims of the MindPlay patents, they have suffered no harm. Defendants have not requested an extension of the remaining expert report deadlines to prepare and submit a rebuttal report, and indeed, they have confirmed that they will be submitting a rebuttal report on the August 16 due date.²

160. Apparently, Defendants think Mr. Strisower should have contributed to the demise of the environment by needlessly attaching the interference tables attached to Mr. Carmichael's report.

² Ironically, Defendants claim that Plaintiffs used this supplementation to "fix" certain perceived deficiencies in the prior interference reports. However, as explained in Plaintiffs' summary judgment briefs on these issues, there were no deficiencies in Plaintiffs' expert reports. *See e.g.*, Plaintiffs' Memorandum in Opposition to Defendants' Eighth Motion for Summary Judgment of Plaintiffs' Counts I-III of Counterclaims for Interference at 7-19. Rule 26 only requires that an expert report set forth the expert's opinions and the basis thereof. "[A]n expert is not required to 'recite each minute fact or piece of scientific information that might be elicited on direct examination to establish the

(Continued...)

Defendants also argue that Mr. Carmichael's supplemental opinion was improper to the extent he confirmed his prior opinion that certain references should have been disclosed to the Patent Office because they were material in that they prove the MindPlay patent claims were obvious, especially in light of *KSR*. But this argument ignores the fact that one of the key issues in determining whether the patentee improperly withheld information is whether the "information ... establishes, by itself *or in combination with other information, a prima facie case of unpatentability of a claim.*" 35 C.F.R. § 1.56 (emphasis added). In other words, a reference is material if it anticipates or renders obvious a claim of a patent application. Thus, obviousness is an important element of whether a reference should have been disclosed, and Mr. Carmichael's discussion of the manner in which the *KSR* decision supports his prior opinion (expressed as part of his inequitable conduct analysis) that certain references were material because they rendered obvious the pending claims falls squarely within the Court's June 14 Order permitting supplementation on the issue of obviousness. Again, Mr. Carmichael has not expressed any new conclusions. Rather, he simply explains how the *KSR* case further supports his previous opinion that certain references were material—because they rendered the pending claims obvious—and, as he said before, should have been disclosed to the Patent Office.

In sum, there is no dispute that Plaintiffs' experts limited their supplemental reports to the issue of obviousness as required by the Court's June 14 Order. Indeed, Defendants acknowledge this. But because Plaintiffs properly chose to update their expert reports to address all of the issues impacted by obviousness, as opposed to just one of those issues, Defendants now seek to re-write the Court's June 14 Order, after Plaintiffs' relied upon it, and have certain issues decided without

admissibility of the expert opinion under *Daubert*.” *Single Chip Systems Corp. v. Intermec IP Corp.*, No. CIV. 04CV1517JAH(CAB), 2007 WL 1970877, *7 (S.D. Cal. June 29, 2007). *See also McCoy v. Whirlpool Corp.*, 214 F.R.D. 646, 652 (D. Kan. 2003) (holding that an expert is not required “to anticipate every criticism and articulate every nano-detail that might be involved in defending the opinion on cross examination”). Defendants, on the other hand, used the Court's June 14 Order to submit completely new opinions on obviousness and to interject alleged prior art
(Continued...)

the benefit of *KSR*. Plaintiffs respectfully request that the Court reject Defendants' attempts to have decisions in this case decided on an incomplete record, and reject Defendants' Motion to Strike.

II. ARGUMENT

A. Plaintiffs' Interference Claims Were Impacted By The Supreme Court's Decision in *KSR* Inasmuch as One Aspect of Interference is Obviousness.

Defendants argue that this Court's June 14 Order permitting supplemental expert reports on obviousness should not stand as a basis to supplement the obviousness portion of Plaintiffs' interference counts. However, it is black letter patent law that:

[T]he first step in an interference analysis is for the court to determine whether an interference exists under 35 U.S.C. § 291 by asking whether the "patents ... have the same or substantially the same subject matter in similar form as that required by the PTO pursuant to 35 U.S.C. § 135." In order to make this determination, we use the "two-way" test which states that two patents interfere only if (1) invention *A* either anticipates **or renders obvious** invention *B*, where Party *A*'s claimed invention is presumed to be prior art vis-à-vis Party *B* and (2) vice versa.

Medichem, S.A. v. Rolabo, S.L., 437 F.3d 1157, 1161 (Fed. Cir. 2006) (emphasis added). And Defendants are well aware that an obviousness analysis is a key aspect of an interference claim. Indeed, in their pending Interference SJ Motion, Defendants explicitly stated that:

To prevail on their claims of Interference, Plaintiffs must show by clear and convincing evidence that the '871 patent anticipates **or renders obvious** the MindPlay patents and that the MindPlay patents anticipate **or render obvious** the '871 patent.

Interference SJ Motion at 2.³

Defendants further reiterated these same arguments in their Reply in Support of Motion for Summary Judgment of Plaintiffs' Counts I-III of Counterclaims for Interference ("Interference SJ Reply"), stating, for example, that: "the underlying questions to the interference-in-fact inquiry in a

never before mentioned. Defendants submitted a 186-page report to supplement the five-pages originally proffered on the issue of obviousness, including detailed discussion of issues that were not impacted in any way by the *KSR* decision.

³ Defendants, of course, got the burden of proof wrong. *Bruning v. Hirose*, 161 F.3d 681, 684 (Fed. Cir. 1998) ("It is well settled that where an interference is between a patent that issued on an application that was copending with an interfering application, the applicable standard of proof is preponderance of the evidence") quoting *Bosies v. Benedict*, 27 F.3d 539, 541-541 (Fed. Cir. 1994).

§ 291 action are those of anticipation *and obviousness* under 35 U.S.C. § 102 and 103.” Interference SJ Reply at 1. *See also id.* at 3 (“The interference analysis, however, requires determining whether the claims of the patents anticipate one another *or render the other obvious*”). Thus, there can be no dispute that obviousness is an integral part of an interference claim. And there should be no dispute that the Court’s June 14 Order that permits supplementation on the issue of obviousness permits Plaintiffs to supplement their report showing how certain claims of the Schubert ‘871 patent render obvious certain claims of the MindPlay patents.

B. Shuffle Master’s Inequitable Conduct Claims Were Impacted By The Supreme Court’s Decision in *KSR* Inasmuch as One Aspect of Inequitable Conduct is Whether the Undisclosed Prior Art Would Render The Invention Obvious.

Defendants also argue that *KSR* had no impact on Plaintiffs’ inequitable conduct claim, allegedly because *KSR* cannot retroactively change what would have been relevant to the obviousness of the pending patent claims (material). Therefore, Defendants contend *KSR* is irrelevant to whether prior art was material to Defendants’ pending patent claims and that Plaintiffs should not be allowed to rely upon *KSR* when arguing that an undisclosed reference was material to the patentability of Defendants’ pending patent claims, because that reference renders the pending claims obvious.

However, it is black letter patent law that the “[d]etermination of inequitable conduct requires a two step analysis. First, the trial court must determine whether the withheld reference meets a threshold level of materiality. The trial court must then also determine whether the evidence shows a threshold level of intent to mislead the PTO.” *Baxter Intern., Inc. v. McGaw, Inc.*, 149 F.3d 1321, 1327 (Fed. Cir. 1998). And one of the tests courts look to when determining materiality is PTO Rule 56, which provides in pertinent part that “information is material to patentability when ... [i]t establishes, by itself *or in combination with other information, a prima facie case of unpatentability of a claim.*” 35 C.F.R. § 1.56 (emphasis added). This is just another way of saying that a reference is material to patentability if it anticipates *or renders obvious* (alone

1 or in combination with other art) the proposed claim. *Canady v. Erbe Elektromedizin GmbH*, 20
2 F.Supp.2d 54, 63-64 (D. D.C. 1998) (“The combination of prior art references that renders a
3 claimed invention obvious to one of ordinary skill must also teach all of the claimed limitations”).
4 In other words, if information would render a patent claim obvious, it is material to patentability
5 and must be disclosed. *Dippin’ Dots, Inc. v. Mosey*, 476 F.3d 1337, 1345 (Fed. Cir. 2007) (“The
6 first prong of the inequitable conduct test, materiality, is clearly met here. As discussed supra, the
7 Festival Market sales render the ‘156 patent invalid for obviousness.”) *See also, Laitram Corp. v.*
8 *Cambridge Wire Cloth Co.*, 785 F.2d 292, 294 (Fed. Cir. 1986) (recognizing, in the context of an
9 inequitable conduct claim, that because an undisclosed prior art reference rendered the patent-in-suit
10 obvious, materiality had been demonstrated). Because materiality, and thus inequitable conduct, can
11 turn on whether an undisclosed reference renders a patent obvious, it was entirely proper for Mr.
12 Carmichael to supplement his report to take the *KSR* decision into consideration when concluding
13 that the references concealed from the Patent Office by MindPlay were material because they
14 contributed to the conclusion that the pending claims were obvious.
15

16 Indeed, Defendants do not contest that a piece of prior art that would render a patent claim
17 obvious would be material and must be disclosed to the Patent Office. Instead, Defendants attempt
18 to argue that because the MindPlay inventors withheld material information back in 1999, before
19 the Supreme Court’s *KSR* decision allegedly expanded the test for obviousness, that the *KSR*
20 decision” had absolutely no impact on Mr. Carmichael’s opinions regarding inequitable conduct.”
21 Motion to Strike at 8. But this argument fails because the obviousness standard set forth in *KSR* is
22 the same standard applicable to the MindPlay’s inventors back in 1999. The only difference is that
23 the Supreme Court clarified that the manner in which recent Federal Circuit authority applied this
24 standard was too rigid, and articulated certain factors as appropriate for consideration when
25 determining whether the previously articulated standard is satisfied. More specifically, and as
26 stated by the Supreme Court:
27
28

1 In *Graham v. John Deere Co. of Kansas City*, 383 U.S. 1, 86 S.Ct. 684, 15 L.Ed.2d
2 545 (1966), the Court set out a framework for applying the statutory language of §
3 103, language itself based on the logic of the earlier decision in *Hotchkiss v.*
4 *Greenwood*, 11 How. 248, 13 L.Ed. 683 (1851), and its progeny. The analysis is
5 objective:

6 “Under § 103, the scope and content of the prior art are to be determined;
7 differences between the prior art and the claims at issue are to be ascertained;
8 and the level of ordinary skill in the pertinent art resolved. Against this
9 background the obviousness or nonobviousness of the subject matter is
10 determined. Such secondary considerations as commercial success, long felt
11 but unsolved needs, failure of others, etc., might be utilized to give light to the
12 circumstances surrounding the origin of the subject matter sought to be
13 patented.”

14 While the sequence of these questions might be reordered in any particular case, ***the***
15 ***factors continue to define the inquiry that controls***. If a court, or patent examiner,
16 conducts this analysis and concludes the claimed subject matter was obvious, the
17 claim is invalid under § 103. Seeking to resolve the question of obviousness with
18 more uniformity and consistency, the Court of Appeals for the Federal Circuit has
19 employed an approach referred to by the parties as the “teaching, suggestion, or
20 motivation” test (TSM test), under which a patent claim is only proved obvious if
21 “some motivation or suggestion to combine the prior art teachings” can be found in
22 the prior art, the nature of the problem, or the knowledge of a person having ordinary
23 skill in the art. KSR challenges that test, or at least its application in this case.
24 Because the Court of Appeals addressed the question of obviousness in a manner
25 contrary to § 103 and our precedents, we granted certiorari. We now reverse.

26 *KSR Intern. Co. v. Teleflex Inc.*, 127 S.Ct. 1727, 1734-1735 (2007) (emphasis added). The Supreme
27 Court went on to state that “[w]hen it first established the requirement of demonstrating a teaching,
28 suggestion, or motivation to combine known elements in order to show that the combination is
obvious, the Court of Customs and Patent Appeals captured a helpful insight.... Helpful insights,
however, need not become rigid and mandatory formulas; and when it is so applied, the TSM test is
incompatible with our precedents.” *Id.* at 1741. In other words, the obviousness standard as
articulated by the Supreme Court back in 1966—and the standard governing MindPlay’s conduct
when it withheld material prior art from the Patent Office—has not changed. But what the *KSR*
decision clarified is that recent Federal Circuit jurisprudence placed too much emphasis on the
requirement of demonstrating a teaching, suggestion, or motivation to combine known elements in
order to show that the combination is obvious, and articulated certain factors as appropriate for

1 consideration when determining whether the previously articulated standard is satisfied. Because
2 the parties in their original expert reports and summary judgment briefing were focused on the
3 teaching, suggestion, or motivation to combine test as defined in recent Federal Circuit cases, the
4 Court's June 14, 2007 Order was necessary to permit, for example, Mr. Carmichael to apply the
5 proper standard as articulated and explained by the *KSR* court without a rigid adherence to the
6 teaching, suggestion, or motivation to combine test emphasized by some more recent Federal
7 Circuit decisions. Thus, far from undermining the need for Mr. Carmichael to supplement his
8 expert report, the *KSR* decision actually supports it. Absent supplementation, Mr. Carmichael could
9 (and knowing Defendants, probably would) be accused of applying a rejected Federal Circuit
10 standard. The Court's permitted supplementation removes this hurdle, as it was intended to do.

12 **C. Neither The Court's June 14 Order Nor the Parties Discussions Preclude**
13 **Addressing Obviousness in the Context of Interference and Inequitable**
14 **Conduct.**

15 Defendants attempt to persuade this Court that Plaintiffs exceeded the scope of the Court's
16 June 14 Order by repeating that Plaintiffs' experts addressed inequitable conduct and interference
17 again and again, in the apparent hope that the Court will conclude, without any investigation or
18 analysis, that obviousness is entirely unrelated to interference and inequitable conduct. But as
19 discussed above, there can be no doubt that obviousness plays an integral role in both interference
20 and inequitable conduct claims. Furthermore, it cannot be legitimately disputed that Plaintiffs'
21 supplemental expert reports were limited to the impact of obviousness on these claims. Indeed, if
22 Plaintiffs had discussed issues beyond just obviousness, Defendants certainly would have come
23 forward with specific examples to support their reckless claims that Plaintiffs violated a court order.

24 Defendants' argument that they did not understand that obviousness would impact any
25 claims beyond prior-art based invalidity, and therefore Plaintiffs should be precluded from
26 submitting supplemental expert reports on anything but prior art based obviousness positions, is
27 contradicted by their own factual background and their own conduct in the negotiations leading to
28

1 the parties' proposed stipulation. More specifically, the first contact between the parties, that led to
2 the stipulation submitted to the Court, was an email from Defendants stating that "we intend to
3 submit supplemental briefing on the impact of KSR, and the recent Fed Cir cases applying KSR, *on*
4 *the pending motions*." Ex. B (5/17/07 Email from J. Kash to M. Bregenzer). Notably, Defendants
5 did not limit their intent to brief the impact of *KSR* to just the prior art based validity motions.
6 Instead, they intended to submit supplemental briefing on *all* the pending motions.

7
8 Additionally, the draft stipulation attached to Defendants' Motion to Strike does not support
9 Defendants' contention that the parties did not contemplate supplementation of expert reports on all
10 issues to the extent they are impacted by obviousness. The draft stipulation expressly permitted the
11 parties "to (a) prepare and submit supplemental expert reports *on the limited issue of obviousness*;
12 (b) conduct supplemental expert depositions of those experts who submit a supplemental expert
13 report; and (c) submit new summary judgment briefing *on validity*."⁴ Ex. C (Plaintiffs' draft
14 stipulation red-lined by Defendants). As explained above, the supplemental reports only
15 supplement the obviousness aspects of the prior reports. Defendants' reliance upon this
16 (unaccepted) stipulation improperly presumes that the supplementation does not relate to
17 obviousness, simply because the obviousness issues addressed are subsumed in a broader analysis.

18
19 Perhaps more importantly, it is Defendants' argument, not Plaintiffs' conduct, that conflicts
20 with this Court's June 14 Order. More specifically, the Court explicitly contemplated that the issue
21 of obviousness was not limited just to prior art based validity as Defendants now argue. In the June
22 14 Order, the Court held that the "supplemental points and authorities shall be limited to the issue of
23 obviousness and the impact of the Supreme Court's decision in KSR International v. Teleflex, Inc.,
24 on the motions #566, #572, #575, #577, #578, #580, and #672." Ex. B (6/14/07 Order). Of course,
25 these are all the pending summary judgment motions, not just those directed at prior art based
26

27 ⁴ At the time, Defendants were confident that additional briefing on interference was unnecessary and that
28 Defendants' summary judgment motion in that regard would be denied.

1 invalidity. And the listed motions include Defendants' Motion for Summary Judgment of
2 Plaintiffs' Counts I-III of Counterclaims for Interference ("Interference SJ Motion"). In other
3 words, the Court explicitly permitted supplemental briefing on "the issue of obviousness and the
4 impact of the Supreme Court's decision in KSR International v. Teleflex, Inc., on" Defendants'
5 Interference SJ Motion. It is therefore inconceivable for Defendants to argue that the Court's June
6 14 Order permitting supplemental briefing on the interplay between obviousness and interference,
7 somehow prohibits supplemental expert reports on the interplay between obviousness and
8 interference. Simply put, the Court's June 14 Order did not preclude discussing obviousness in the
9 context of the interference count or the inequitable conduct defense. As a result, Defendants'
10 argument that Plaintiffs somehow exceeded the scope of the Court's June 14 Order by addressing
11 "the issue of obviousness and the impact of the Supreme Court's decision in KSR International v.
12 Teleflex, Inc., on" issues beyond prior art based validity, fails.

14 To the extent Defendants were actually surprised, and failed to understand the scope of the
15 Court's June 14 Order, there is still no harm to Defendants. Because inequitable conduct and
16 interference are both issues on which Plaintiffs' bear the burden of proof, Defendants would not
17 have submitted an opening supplemental report on those issues anyway. Defendants would have
18 been in the same position they are now; they would be providing a rebuttal report to Plaintiffs'
19 expert reports. Further highlighting the lack of any prejudice, Defendants have advised Plaintiffs
20 they will be submitting a rebuttal expert report addressing the impact of obviousness on the
21 inequitable conduct and interference claims. Ex. D (8/14/07 Letter from A. Pallios-Roberts to M.
22 Bregenzer). Once that happens, Plaintiffs will provide a copy of that report to the Court.

24 **III. CONCLUSION**

25 WHEREFORE, for the reasons set forth above, Plaintiffs respectfully request that this Court
26 deny Defendants' Motion to Strike.

1 Dated: August 16, 2007

Respectfully submitted,

3 /s/ Barry F. Irwin

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on August 16, 2007, a copy of the foregoing **PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO STRIKE THE SUPPLEMENTAL EXPERT REPORT OF JAMES T. CARMICHAEL AND THE PORTIONS OF THE SUPPLEMENTAL EXPERT REPORT OF JOHN STRISOWER ADDRESSING PLAINTIFFS' INTERFERENCE CLAIM FOR VIOLATION OF THE COURT'S JUNE 14, 2007 ORDER** was served on the following:

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